Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

PAUL CLARK

Petitioner,

vs.

ROY ANDERSON CORPORATION and R.A. BUILDING CORPORATION

Respondent,

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the United States Court of Appeals for the Fifth Circuit definition of a vessel too restrictive?

2. Is the question whether or not the barge involved in this case a question of fact for jury determination or proper for summary judgment?

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Appendix A--Opinion of the United States Court of Appeals for the Fifth Circuit dated August 15, 1997 . . . . . 1a

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Petitioner, Paul Clark, respectfully prays that a writ of certiorari issue to review the Opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on August 15, 1997.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is attached as Appendix A. The Summary Judgment and Memorandum Order of the District Court are attached as Appendices B and C.

BASIS FOR JURISDICTION

1. August 15, 1997 Opinion by the United States Court of Appeals for the Fifth Circuit in the case styled ***Paul Clark v. Roy Anderson Corporation and R. A. Building Corporation***, No. 96-60867 wherein the Court affirmed the District Court's Order granting the Defendant's Motion for Summary Judgment.

2. The November 12, 1996 United States District Court for the Southern District of Mississippi, Southern Division, Memorandum Order entered in the case styled: ***Paul Clark v. Roy Anderson Corporation and R. A. Building Corporation*** Civil Action No. 1:95-CV-585RR.

3. The statutory provision believed to confer on this court jurisdiction to review on a writ of certiorari the Judgment or Order in question is 28 U.S.C. § 2101(c).

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance, the United States District Court for the Southern District of Mississippi, Southern Division, was 46 U.S.C. § 688 and the General Maritime Law.

Roy Anderson Corporation, hereinafter RAC, contracted to construct Boomtown Casino on the navigable waters of the back bay of Biloxi. The casino site, constructed on barges, was constructed on the industrial seaway in Gulfport, Mississippi. The permanent site was located on the back bay of Biloxi in Biloxi, Mississippi. On April 4, 1994, Clark was hired by RAC as a rigger at the Biloxi, Mississippi site.

Frank Jenkins, the project superintendent at the Boomtown Casino site, testified Clark was used as a rigger. Mr. Jenkins testified:

1. When moving material with a crane, Clark rigs it, hooks it up to the crane and whenever it's landed wherever it might be going, then he unhooks it.

2. The barge belonged to McDonough Marine Company.

3. The crane was loaded onto the barge. It would move on the barge and it would be tied off. It had a turn buckle or a clamp that would be tied in a knot and then it would be cabled down.

4. When the crane moved on the barge the rigger was responsible for removing the ties and replacing them.

5. One of Mr. Clark's jobs was to ensure the crane operated safely on the barge.

Clark testified his job description and duties as a rigger were:

1. We went out to the barge each day on a motor boat.

2. While at Boomtown I did not do rigging on land.

3. When material was swung to my barge it was loaded by

other riggers and then swung to my barge on the water.

4. Clark's duties included helping move the barge about the work site on navigable water. The barge was moved by a tug boat. When the tug was going to move the barge Clark would hook the tug to the barge and secure it. He would then secure the crane.

Clark was injured May 1, 1994. The crane had been leaking oil for some time and RAC had attempted to repair same, unsuccessfully. On this date oil had leaked onto the deck of the barge. The deck of the barge was wet due to rain. Clark had assisted moving the crane on the barge and when he walked around the crane he stepped into an oil patch. Both of his feet went in the air and his right foot went into a pad the crane drives on. His back hit one of the big lugs. His right foot twisted all the way around. Clark got oil all over his pants and back.

The crane was owned by RAC. Clark and the crane operators had informed Frank Jenkins that the crane was leaking.

McDonough Marine Company bare boat chartered the barge to RAC. According to John Graham, an executive vice president with McDonough Marine, this barge can be used to carry cargo, be a work platform, be used as a crane barge, buffer barge, virtually any type of use that someone needs a floating steel box. It is capable of being used in navigation and has been used in navigation over navigable waters.

Frank Jenkins testified the crane was placed on the barge for several reasons:

1. The casino was being built out over water and to reach the back side of the building could only be done by a crane on the barge.

2. The crane on the barge was used to get material to the

building. It was necessary to go onto the water in order to construct the casino.

The barge was originally stationed at another job site and moved to Biloxi along navigable waters. While at the Biloxi site the barge remained on navigable waters. (The Respondent concedes that the alleged injury occurred on the barge while on navigable waters.)

David E. Cole, a marine consultant, obtained a B.S. in Maritime Transportation from the State University of New York Maritime College and a J.D. from Loyola University of New Orleans, Louisiana. He holds an unlimited Third Mate's License and an unlimited Abled Seaman's Certificate. He spent twenty years on active duty as a commissioned officer of the United States Coast Guard, with eighteen of those years being within the marine safety specialty. He has spent the bulk of his time since 1973 investigating casualties, which includes the grounding of vessels, allisions, collisions, fires, explosions, sinkings, capsizings, personal injuries and deaths. By way of Affidavit, Commander Cole stated:

1. The barge in question has been described as a spud barge, which is a barge frequently found in all maritime environments.

2. Spud barges are a type of deck barge, which is used for the transportation of equipment and materials in all phases of the maritime community. Deck barges are used to transport pipe and material to drilling rigs, both off shore and in inland waters, for the transportation use of cranes at marine work locations, and for any other type of commodity which can be placed aboard.

3. This type barge differs from entities which are not vessels, such as painting platforms used by ship yards in that those platforms have no real transportation function, where a deck barge transports cranes, supplies, materials and various

other products as their normal occupation.

4. Mr. Clark was a member of the crew of this barge since the barge could not have performed its mission without the services performed by Mr. Clark and those working aboard it.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT'S DEFINITION OF A VESSEL IS TOO RESTRICTIVE.

The term "vessel" has been subject to much interpretation. The first statutory definition of vessel was formulated in 1 U.S.C. § 3 which states: "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

Over the years, the Fifth Circuit has adopted a different "vessel" status test for Jones Act purposes. The Fifth Circuit has stated the test for determining vessel status under the Jones Act is "the purpose for which the craft is constructed and the business in which it is engaged". ***Himba v. Shreveport McMoran Energy Partners Limited***, 811 F.2d 276 (5th Cir. 1987). The Fifth Circuit's definition of a vessel is much more restrictive than the one found in 1 U.S.C. § 3.

Congress intended the term "vessel" to have the meaning it established. This Court has previously held that the meaning of the terms established by Congress under the Jones Act should be enforced. ***Chandriss, Inc. v. Latsis***, 51[illegible] U.S. _____, 132 L.Ed.2d 314, 115 Sup.Ct. _____ (1995). The Fifth Circuit has restricted the Congressional intended definition of vessel. In ***Chandriss***, supra, this Court stated that leaving the definition of the Jones Act scope to the lower courts. "Unfortunately, as a result, the perils of the sea, which mariners suffer and ship owners insure against, have met

their match in the perils of judicial review."

This Court faced with the issue of whether or not a crane carrying barge was a vessel determined it was. ***Grubart, Inc. v. Great L.D. and D. Company***, 513 U.S. _____, 130 L.Ed.2d 1024, 115 Sup.Ct. _____ (1995). The Barge in Grubart, just as it is in this case, was a barge carrying a work crane. It was towed into place by a tug and once put in place lowered pins to hold it in place. This Court held:

> The place in the river where the barge sat, and from which workers directed the crane, is in the navigable waters of the United States. Thus, if Great Lakes committed a tort, it must have done it while on navigable waters. It must also have done it "by a vessel". Even though the barge is fastened to the river bottom and was in use as a work platform at times in question, at other times it was used for transportation.

The Fifth Circuit's restrictive definition of a vessel does not satisfy the remedial intent of the Jones Act and Maritime Law.

II. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IGNORED THE FACT THAT THE QUESTION OF WHETHER OR NOT THE BARGE INVOLVED IN THIS CASE IS A QUESTION OF FACT FOR JURY DETERMINATION AND IS NOT PROPER FOR SUMMARY JUDGMENT.

Under Rule 56(c) of the Federal Rules of Civil Procedure, the judge's function at the summary judgment stage is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether the judge is ruling on a motion for summary

judgment or on a motion for directive verdict. On a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences that would be drawn in the nonmovant's favor. The trial court should act with caution in granting summary judgment, and may deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 91 L.Ed.2d 202, 105 Sup.Ct. 2505 (1986).

Who is a member of a crew and therefore who is a seaman is a mixed question of law and fact. If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a member of the crew, is a question for the jury. The question of seaman status is normally for the fact finder to decide. ***Chandriss, Inc.***, supra.

A vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed or at dockside. ***Chandriss, Inc.***, supra.

Summary judgment is appropriate when the facts establish the lack of seaman status beyond question as a matter of law and no reasonable evidentiary basis exists to find seaman status. The task is to determine whether reasonable persons might draw conflicting inferences. ***Ellender v. Keva Construction and Engineering, Inc.***, 909 F.2d 803 (5th Cir. 1990).

The question of seaman status should only be removed from the trier of fact by summary judgment or directed verdict in rare circumstances. Even marginal Jones Act claims should be submitted to the jury. ***Sharpe v. Wausau Insurance Company***, 917 F.2d 885 (5th Cir. 1990).

Seaman has been defined for Jones Act purposes as an employee (1) who is permanently assigned to a vessel or who performs the substantial part of his work on the vessel and (2) whose duties contribute to the function of the vessel and the

accomplishment of its mission. ***McDermott International v. Wealander***, 598 U.S. _____ 112 L.Ed.2d 866, 111 Sup.Ct. 807 (1991). The question of whether a floating structure is a vessel is fact specific and is usually left to the jury. ***Southwest Marine v. Gizoni***, _____ U.S. _____ 116 L.Ed.2d 405, 112 Sup.Ct. 846 (1991).

Clark and his employers have testified that he was assigned to the barge and the crane as a rigger. All have testified that his duties contributed to the function of this vessel or to the accomplishment of its mission.

To defeat vessel status the District Court and subsequently the Fifth Circuit Court of Appeals, which did not issue an opinion and therefore is bound by the District Court judge's findings, determined that this was a work platform and not a vessel constructed or designed for the transportation of passengers, cargo or equipment across navigable waters. However, this finding is directly in conflict with the only individual who testified concerning this issue, Mr. Graham. Mr. Graham, whose company's bare boat charters these barges has testified that this is a barge that is used to carry cargo and used in navigation over navigable waters. David E. Cole, Plaintiff's expert, stated, by Affidavit, that this is a vessel and not a work platform.

Clark sustained his burden to present sufficient facts which would require that the District Court judge to allow a jury to make the determination whether or not the barge in question was a vessel and Clark a seaman.

In ***Coats v. Penrod Drilling Corporation***, 511 F.3d 113 (5th Cir. 1995) that Court stated:

> The Jones Act, as Welfare legislation (the express Congressional purpose of the Jones Act was to provide for the welfare of seamen) is entitled to a liberal construction to accomplish its beneficent

purposes.

Petitioner respectfully requests that this Honorable Court grant his Petition for Certiorari.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully Submitted,

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APPENDIX A --OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AUGUST 15, 1997.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60867

PAUL CLARK

Appellant

V.

ROY ANDERSON CORP. and R.A. BUILDING CORP.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:95CV-585-R-R
District Judge: Honorable Dan M. Russell, Jr.

Before: KING, HIGGINBOTHAM, AND DUHE,
Circuit Judges.

PER CURIUM:[1]

Paul Clark has appealed the district court's order granting the defendants' motion for summary judgment and dismissing his tort claims under the Jones Act and General

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[1]Pursuant to the 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Maritime Law. Clark contends that the district court erred in determining that the spud barge on which the alleged injury occurred was not a "vessel" for purposes of the Jones Act. Clark also contends that the district court erred in determining that it did not have jurisdiction under General Maritime Law to entertain the tort claim. We have carefully reviewed the record and the briefs, and, essentially for reasons stated by the district court, **Clark v. Roy Anderson Corp.**, No. 1:95-CV-585RR (S.D. Miss. Nov. 12, 1996), we AFFIRM the district court's order granting the defendants' motion for summary judgment.

AFFIRMED.

APPENDIX B--SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION DATED DECEMBER 11, 1996

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 1:95-CV-585-RR

PAUL CLARK

V.

ROY ANDERSON CORPORATION,
JOHN DOE AND R.A. BUILDING CORP.

SUMMARY JUDGMENT

RUSSELL Dan M., Jr., U.S. District Judge

This cause having come before the Court on the Motion for Summary Judgment of the defendant, Roy Anderson Corp. and R.A. Building Corporation, and the Court, being fully advised in the premises, and having filed herein on or about November 12, 1996 its Memorandum Order, which Memorandum Order is incorporated herein by reference.

IT IS, THEREFORE, ORDERED AND ADJUDGED, that the Motion for Summary Judgment of the Defendants, Roy Anderson Corp. and R.A. Building Corporation be, and it is, hereby granted.

Appendix B

IT IS FURTHER, ORDERED AND ADJUDGED, that Summary Judgment be, and it is, hereby entered in favor of the Defendants, Roy Anderson Corp. and R.A. Building Corporation and against the Plaintiff, at the cost of the Plaintiff, for which let execution issue.

SO ORDERED AND ADJUDGED, this the 10th day of December, 1996.

s/ Dan M. Russell, Jr.
DAN M. RUSSELL, JR.,
U.S. DISTRICT JUDGE

Approved as to form only:
s/Woodrow W. Pringle, III
WOODROW W. PRINGLE, III
ATTORNEY FOR PLAINTIFF

s/James O. Dukes
JAMES O. DUKES
ATTORNEY FOR ROY ANDERSON CORP.

s/Joseph B. Guilbeau
JOSEPH B. GUILBEAU
ATTORNEY FOR R. A. BUILDING CORPORATION

APPENDIX C--MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION DATED NOVEMBER 12, 1996

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 1:95-CV-585-RR

PAUL CLARK

V.

ROY ANDERSON CORPORATION,
JOHN DOE AND R.A. BUILDING CORP.

MEMORANDUM ORDER

RUSSELL, Dan M., Jr., U.S. District Judge

This matter is before this Court on Motion of the defendants, Roy Anderson Corporation ("RAC") and R.A. Building Corporation ("RAB"), for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure for the reasons that plaintiff's allegations and undisputed material facts fail to establish any liability under the Jones Act.[1]

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[1]The Jones Act, 46 U.S.C., Section 688, provides: "any seaman who shall suffer personal injury of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United

Appendix C

The Plaintiff has also asserted pendent claims against third party defendants in this cause. RAC and RAB further move this Court to dismiss any and all such claims since summary judgment on the Jones Act issue will dispose of federal question jurisdiction, and the Court would lack the requisite subject matter jurisdictions over such pendent claims since the parties are not diverse.

I. FINDINGS OF FACT

On May 1, 1995, plaintiff worked as a crane rigger at the Boomtown Casino construction site. On that date plaintiff alleges he slipped and fell on an oil patch while working on a barge thus causing him to injure his foot and leg. Plaintiff has brought this claim against RAC and RAB for Jones Act negligence, unseaworthiness, and maintenance and cure. In order to successfully bring these claims, plaintiff must prove his status as a "seaman." **See Pavone v. Mississippi Riverboat Amusement Corp.**, *52* F.3d 560 (5th Cir. 1995). It is this issue of "seaman status" that must be resolved.

States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; in the case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Appendix C

A key determinant in establishing seaman status is whether the facility in which plaintiff was assigned to work is considered, as a matter of law, a "vessel." The plaintiff presumably alleges that the barge upon which he performed his rigging duties is in fact a "vessel." In 1995, the Fifth Circuit opined in **Pavone** that the BILOXI BELLE was an indefinitely moored floating casino, removed from navigation, and was a work platform at the time of the alleged accidents, and therefore, was not a "vessel" for purposes of the Jones Act or general maritime law. In the case sub judice the plaintiff apparently intends to assert that the crane barge used in the construction of Boomtown Casino[2] is a Jones Act "vessel," and therefore satisfies the "vessel" prong necessary to determine "seaman" status. The defendants RAC and Rab submit that the crane barge upon which the plaintiff performed his rigging duties was a work platform and not a "vessel" as a matter of law.

The crane barge on which the plaintiff alleges he was injured was used in the construction of the Boomtown Casino. It was used for construction purposes on the navigable waters of Biloxi's back bay. At the time of plaintiff's alleged injury, he was assisting the crane in reaching some materials. Paul Clark depo. p. 65, line 23 - p. 66, line 15. Other than being moved from time to time by means of tug boat to other areas immediately within the construction site, the crane barge was at all other times

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[2]The status of Boomtown Casino as a "vessel" is not an issue in this case. Boomtown Casino would clearly be adjudicated a "non-vessel" based upon the Fifth Circuit's holding the BILOXI BELL to be a non-vessel in **Pavone.**

stationary. Paul Clark depo. p. 30, lines 8-25. The crane barge was securely held in place by two large pilings ("big pins") which went down into the dirt. Paul Clark depo. p. 30, lines 17-25.

The plaintiff submits that the barge in issue was a vessel for purposes of the Jones Act as generally it has been described as a "spud" barge which is a barge frequently found in all maritime environments. It is non self-propelled and requires a towing vessel for its movement. Furthermore, the plaintiff argues that the barge in question was a raked bow and that a raked bow is one designed to help the barge cut through the water. Citing Graham depo., p. 20. The barges were leased by McDonough Marine to RAC and are the same type barge upon which the crane was placed. Plaintiff noted that after leasing the barges to RAC, it makes arrangements for transporting the barges to its work location. Graham depo., p. 15. The plaintiff further submits that the barges are used in all types of maritime activity over navigable waters including the transportation of cargo, as work platforms, crane barge, buffer barge, and virtually any type of use for which someone needs a floating steel box. Graham depo. p. 13.

II. CONCLUSIONS OF LAW

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). **See Anderson v. Liberty Lobby**, 477 U.S. 242, 248 (1986); **St. Amant v. Benoit**,

806 F.2d 1294, 1296-1297 (5th Cir. 1987). The non-moving party to successfully defeat a summary judgment motion must establish a key element in this case which, as a matter of law, placed liability on the moving party. **Celotex Corp. v. Catrett**, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552 (1986). Although the issue of determining whether a person is a "seaman" is normally a question for the jury, the "issue may be resolved by summary judgment where the undisputed material facts establish as a matter of law that an individual is not a Jones Act seaman." **Barrios v. Engine & Gas Compressor Services, Inc.**, 669 F.2d 350, 352 (5th Cir. 1982).

In Clark's claim for Jones Act benefits, the burden of establishing seaman status rests with him. **See Billings v. Chevron, U.S.A., Inc.**, 618 F.2d 1108, 1109 (5th Cir. 1980) ("in order to establish Jones Act jurisdiction, Plaintiff must show that at the time of his injury he was a seaman on a vessel...."); **Daniel v. Ergon, Inc.**, 892 F.2d 403, 407 (5th Cir. 1990)(holding that the "existence of a vessel is a 'fundamental prerequisite to Jones Act jurisdiction' and is at the core of the test for seaman status"). All the tests for Jones Act seaman status have varied slightly in terminology; the undisputed criteria are as follows:

(1) [H]e must have a more or less permanent connection with,

(2) a vessel in navigation, and

(3) the capacity in which he is employed or the duties which he performs must contribute to the function of the vessel, the accomplishment of its mission or

its operation or welfare in terms of its maintenance during its movement or during anchorage for ports future trips.

Bernard v. Binnings Construction Co., Inc., 741 F.2d 824, 827 (5th Cir. 1984)(citing **Barrios**, 669 F.2d at 352; **Watkins v. Pentzien, Inc.**, 660 F.2d 604, 606 (5th Cir. 1981), **cert. denied**, 456 U.S. 944 (1982).

The United States Court of Appeals for the Fifth Circuit has repeatedly stated the test for determining vessel status is "the purpose for which the craft is constructed and the business in which it is engaged." **Hemba v. Freeport McMoran Energy Partners, Ltd.**, 811 F.2d 276, 277 (5th Cir. 1987) (citing **Blanchard v. Engine and Gas Compressor Servs., Inc.**, 575 F.2d 1140, 1142 (5th Cir. 1978)). As can be seen, the fifth Circuit definition of a vessel is much more restrictive than the one found in 1 U.S.C. Section 3. A structure may be considered a vessel if its design or use is "transportation of passengers, cargo or equipment across navigable waters." **Hemba**, 811 F.2d at 277 (quoting **Cook v. Bleden Concrete Products, Inc.**, 472 F.2d 999, 1002 (5th Cir.), **cert. Denied**, 414 U.S. 868 (1973) (stating that some movement, both perpendicular and lateral was necessarily part of regular operation of floating dry docks and similar structures and holding that such structures were not "vessels" as a matter of law).[3]

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[3]In Cook, the Fifth Circuit went on to state that "capability" to sustain such movement has been held insufficient to establish that such craft are constructed for the purpose of navigation." 472 F.2d at 1102, citing **The Robert Parsons**

Appendix C

In applying the criteria in the Fifth Circuit's test to the instant case, the crane barge upon which the plaintiff performed his rigging duties is not such a conventional vessel. In **Ellender v. Kiva Constr. & Engineering, Inc.**, 909 F.2d 803 (5th Cir. 1990), considered whether a crane rigger who initiated a Jones Act suit against his employer was in fact a Jones Act seaman. The Fifth Circuit held that the four barge platform assembly, which included the barge upon which the laborer working when injured, was not a Jones Act vessel, and therefore the rigger was not a Jones Act seaman. The Court held that to qualify as a Jones Act seaman, a person must have worked on a "vessel." **Ellender**, 909 F.2d at 806. The **Ellender** court reiterated its previous holdings in regard to the vessel status test - "the purpose for which the craft was built and the business in which it was engaged." The court further held that "[o]ther factors like the structure's size, its ability to float, its permanent fixation to the shore or the bottom, and its movement or its ability to move across navigable waters are inconclusive." **Ellender**, 909 F.2d at 806, citing **Bernard**, 741 F.2d at 829; **Cook**, 472 F.2d at 1000-1001 (5th Cir.), **cert. denied**, 414 U.S. 868, 94 S.Ct. 175, 38 L.Ed 2d 116 (1973). Moreover, "structures whose primary function is non-navigational or non-transportational may still qualify as vessels, if the structure was involved in navigation at the time of the injury." **Ellender**, 909 F.2d at 806 citing **Bernard**, 741 F.2d at 829; **Cook**, 472 F.2d at 1002. The court went on to state that based upon these established principles, the Fifth Circuit has routinely held, as a matter of law, that neither a single construction barge nor several barges strapped together to form a floating platform constitute "vessels" under the Jones

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[Perry v. Haines], 191 U.S. 17, 30, 24 S.Ct. 8, 12, 48 L.Ed. 73 (1903).

Appendix C

Act. **Ellender**, 909 F.2d at 806, citing **Waguespack v. Aetna Life & Cas. Co.**, 795 F.2d 523, 526 (5th Cir. 1986), **cert. denied**, 479 U.S. 1094 (1987). The court summarizes rationale behind this decision in **Bernard**, 741 F.2d at 831:

A review of these cases indicated three factors in common to them:

1. the structures involved were constructed and used primarily as work platforms;

2. they were moored or otherwise secured at the time of the accident; and

3. although they were capable of movement and were sometimes moved across navigable waters in the course of normal operations, any transportation function they performed was merely incidental to their primary purpose of serving as work platforms.

See Daniel, 892 F.2d at 804, 407.

Finally, the court in **Ellender** stated that where a barge is not designed or used to transport passengers, cargo or equipment from place to place across navigable waters, where the barge required tug boats or other vessels to move it, and where the barge remained virtually stationary during any particular project, the barge would not qualify as a Jones Act vessel. **Ellender**, 909 F.2d at 806, citing **Ducrepont v. Baton Rouge Marine Enterprises, Inc.**, 877 F.2d 393, 395 (5th Cir. 1989) (holding that structure may be nonvessel for Jones Act purposes even if it fails to meet each criteria common to

structures previously found not to be Jones Act vessels.) Thus, the **Ellender** court found that the spud barge which support a large mobile crane and other work equipment needed to build the oil platform was built primarily to serve as a work platform, and that the barge's "transportation function" were merely incidental to its other uses. **Ellender**, 909 F.2d at 807.

In both **Ellender** and in the instant case, the barge supported a crane which was used primarily for construction purposes. **Compare Ellender**, 909 F.2d at 807 and Paul Clark depo. p. 30, lines 8-16. Similar to the barge in **Ellender**, the crane barge was moved from time to time by tug boats in order to facilitate the ongoing construction at their respective sites. **Compare Ellender**, 909 F.2d at 805 and Paul Clark depo. p.28 line 1 - p. 30, line 25. Likewise, the crane barge in the case sub judice was neither designed for navigation nor engaged in navigation at the time of the accident. The mere fact that the crane barge was moved from time to time via a tug boat, does not provide the requisite threshold in order to make a crane barge a Jones Act "vessel" for performing these incidental "transportation functions." **Ellender**, 909 F.2d at 807.[4] **See also, D. Canale Food Services, Inc. v. Splash Casino and Resort, Inc., et al.**, Civil Action No. 2:95-CV-70-B-A (N.D. Miss.) (Memorandum Opinion dated October 25, 1995((vessel being towed incapable of being used as a means of transportation on water, i.e., casino was not a vessel for

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[4]Similar to the facts in **Ellender**, the plaintiff was transported to and from the barge by means of "a little old motor boat" (**Compare Ellender**, 909 F.2d at 807 and Paul Clark depo. p. 24, line 4) or by means of a "long board"/gang plank. Paul Clark depo. p. 24, lines 14-25.

purposes of a maritime lien and court lacked admiralty jurisdiction over the claim).

In the plaintiff's brief in opposition to the defendants' Motion plaintiff alleges that the defendants have only argued that plaintiff is not a Jones Act seaman because the barge in question is not a vessel. Plaintiff argues that the complaint clearly provides a claim for Jones Act relief as well as general maritime law recovery. Specifically, the plaintiff cites the court to **Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.**, 513 U.S. ____, 115 S.Ct. 1043 (1995). The defendants submit that the plaintiff cannot now assert claims for negligence under general maritime law and the complaint does not allege such. See plaintiff's amended complaint. Furthermore, the plaintiff's complaint sets forth that he bring his cause of action under the Admiralty Act. It is unclear which exact act this is and the Jones Act. See plaintiff's complaint, para. X. Defendant RAC submits that it is not clear whether in fact the plaintiff actually pled on unseaworthiness claim under the Jones Act but has read the complaint literally to include such a claim.

In addressing the plaintiff's allegations in his brief that he has alleged general maritime law claims, the Court still does not find that the defendants' motion should not be granted. The plaintiff argues that **Grubart, supra**, requires that this Court allow plaintiff to proceed on general maritime claims as in that case the barge in fact was considered a vessel. A review of the case reflects that the petitioners therein did not dispute the conclusion of the lower court's below which had apparently held that the barge was a vessel for admiralty tort purposes. **Id.** at 1409. Rather, the issue before the Supreme Court in **Grubart** was whether "a Court of the United States ha[d]

admiralty jurisdiction to determine and limit the extent of" the defendant, Great Lakes, tort liability under the Limitation to Liability Act. **Grubart**, 115 S.Ct. At 1046. The Court in **Grubart** discussed the traditional "situs" and "nexus" test necessary to confer admiralty jurisdiction in conjunction with the Admiralty Extension Act.

Furthermore, the barge in **Grubart** was used "at other times... for transportation." **Id**. Such is not the case before this court relative to the barge in question. It has been determined that any transportation function which the barge before the Court served, if any, was purely incidental to its primary use as a work platform. It is not the dispute that the barge required the use of a tug boat to be moved. There is nothing before the Court to show that the barge was used in maritime activity and for the purpose of this suit was only be used as a work/construction platform.

The Plaintiff also cites the Court to **Coats v. Penrod Drilling Corp.**, 5 F.3d 877 (5th Cir. 1993), in which the Court held that an injury aboard a vessel which functioned as a jack-up drilling rig on navigable waters was maritime activityith effect on maritime commerce, thus conferring admiralty jurisdiction. This case is again distinguishable from the situation before the Court herein whereas similar to **Grubart, supra**, there was no apparent question in regard to vessel statutes. In **Coats** the court applied the four Kelly factors which are (1) the function and the roles of the parties, (2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and (4) traditional concepts of the role of admiralty law. Said factors are used to determine whether admiralty jurisdiction should be invoked and general maritime

law should be applied. **Id**. In the instant case, the Court agrees that application of the four Kelly factors clearly shows that this is not a case that has any substantial relationship to traditional maritime activities. Regarding the function and roles of the parties, RAC and RAB are both engaged in the construction business. Boomtown Casino has been held, pursuant to **Pavone, supra**, as not a vessel. Thus they were not functioning in traditional maritime related activities. **See Also, Coats**, 5 F.3d at 885.

In considering factor two -- the types of vehicles and involved -- again as in **Coats**, the injury occurred upon a vessel in navigable waters. Such is not the case, and the nexus which strengthened the connection to admiralty jurisdiction in **Coats** is not present herein.

As regards the third factor -- causation and type of injury -- the plaintiff did not suffer from a tort which would be considered uniquely maritime, thus not in any way favoring or conferring admiralty jurisdiction.

Finally, considering the fourth factor -- traditional concepts of the role of admiralty -- allegations concerning incidents occurring on a vessel are not present here. **See Molett v. Penrod Drilling, Co.**, 826 F.2d 1419 (5th Cir. 1987), **cert. denied**, 493 U.S. 1003 (1989) (the Court in **Penrod** focused on the fact that the tort occurred upon a vessel).

Finally, the plaintiff has cited **Molett, supra**, as support for admiralty jurisdiction, which applies three additional factors to the Kelly test, which include:

Appendix C

1. The impact of the event on maritime shipping and commerce.

2. The desirability of a uniform national rule to apply to such matters.

3. The need for admiralty expertise in the trial and decision of the case.

Yet, in considering these additional three factors, it is this court's opinion that the plaintiff's claim is not the type of tort claim to which general maritime law applies. Mr. Clark's alleged slip and fall injury on a barge on the back bay of Biloxi could hardly be considered to impact maritime shipping and commerce. There is no need for a uniform national rule in this case since the construction of indefinitely moored casinos over navigable waters is unique to the State of Mississippi and since the Fifth Circuit has already stated that the casinos are not vessels as matter of law. Thirdly, there is no need for admiralty expertise in the trial and decision in this case since the alleged incident - slip and fall - is not unique to the general maritime law.

The plaintiff has also submitted the case of **Complaint of Tom-Mack, Inc. v. Biela**, 76 F.3d 678 (5th Cir. 1996). In said case, the original complaint alleged that a charter was an owner and operator of a fleet of vessels, including a barge, and that on occasion the vessels in question were operated in furtherance of the charter's business at the time of the accident. A review of this case reflects that it is inapplicable to the matter before this Court. In **Tom-Mack**, the Limitation of Liability Act, § 46 U.S.C.A. 181, **et seq.**, was at issue; yet, the question

of vessel status under the Limitation of Liability Act is considerably more broad in the determination of vessel status than under the Jones Act. Furthermore, in **Tom-Mack**, the court held that "reasonable possibility" existed as to whether the barge in **Tom-Mack** was in fact a vessel under the Limitation of Liability Act. **Id.** At 683. The Court, however, neither held that the barge in **Tom-Mack** was a vessel under the Limitation of Liability Act, nor did it state that there was any probability that the particular barge was in fact a vessel for the purposes of the Limited Liability Act. Thus, the Court does not find this case persuasive to a determination of the issues before it.

Accordingly, this Court is of the opinion that the crane barge is, as a matter of law, not a vessel; and, the plaintiff, as such, cannot be a seaman, and his claim for Jones Act negligence, seaworthiness and maintenance and cure must fail.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Motion of the defendants, Roy Anderson Corporation and R.A. Building Corporation, for Summary Judgment is hereby GRANTED, and the Complaint filed in this cause is hereby DISMISSED.

SO ORDERED AND ADJUDGED this the 8th day of November, 1996.

s/Dan M. Russell, Jr.
DAN M. RUSSELL, JR.
UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
APR 30 1998
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(2)

No. 97-1662

In The

Supreme Court of the United States

October Term, 1997

PAUL CLARK,

Petitioner,

versus

ROY ANDERSON CORPORATION AND
R.A. BUILDING CORPORATION,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner has presented a compelling reason for this Court to grant certiorari.

2. Whether the evidence was insufficient under settled legal standards to support Petitioner's claim that summary judgment was inappropriate under the facts presented in the record.

3. Whether the Court should expend judicial resources on a case which summary judgment would be appropriate on additional grounds under this Court's holding in *Harbor Tug & Barge Co. v Papai*, ___ U.S. ___, 117 S. Ct. 1535, 137 L.Ed.2d 800 (1997).

PARTIES TO THE PROCEEDING

1. Paul Clark
2. Roy Anderson Corporation (parent corporation – R.A. Holding Corporation)
3. R. A. Building Corporation

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CITATION OF OPINION AND ORDERS

1. United States District for the Southern District of Mississippi, Southern Division, Memorandum entered on November 12, 1996 in Civil Action No. 1:95-cv-585RR.

2. United States District Court for the Southern District of Mississippi, Southern Division, entry of Summary Judgment on December 11, 1996 in Civil Action No. 1:95-cv-585RR.

3. United States Court of Appeals for the Fifth Circuit No. 96-60867, appeal affirmed, on August 15, 1997.

BASIS FOR JURISDICTION

28 U.S.C. §2101(c) is the statutory provision which confers jurisdiction upon this Court to review this Petition for Writ of Certiorari.

APPLICABLE STATUTES

46 U.S.C. §688

STATEMENT OF THE CASE

On May 1, 1994, the Petitioner, Paul Clark, worked as a crane rigger at the Boomtown Casino construction site. On that date, the Petitioner alleges that he slipped and fell on an oil patch while working on a barge, thus causing him to injure his foot and leg. The crane barge on which the plaintiff alleges he was injured was used for

construction purposes on the navigable waters of Biloxi's Back Bay in construction of the Boomtown casino.[1] Frank Jenkins, Project Superintendent for Roy Anderson Corp. (hereinafter "RAC") on Boomtown Casino's site, testified that the crane which was on the barge was owned by RAC, that RAC placed the crane on the barge, the crane slid forward from one end to the other of the barge and the crane was used to build the back side of the casino since it could not be reached by cranes from shore. At the time of plaintiff's alleged injury, the plaintiff was assisting the crane in reaching some materials. Other than being moved from time to time by means of a tugboat to other areas immediately within the construction site, the crane barge was at all other times stationary. The crane barge was securely held in place by two large pilings ("big pins") which went down into the dirt.

SUMMARY OF THE ARGUMENT

The crane barge on which plaintiff was working at the time of this accident and injury and to which he alleges he was permanently assigned, was used for construction purposes. It was only occasionally moved by tugboat for short distances about the construction site. At all other times, it was affixed to the floor of the Back Bay

[1] The status of the Boomtown casino as a "vessel" is not in issue in this case. Boomtown Casino clearly would be adjudicated as a "non-vessel" based upon the 5th Circuit's holding that the Biloxi Belle is a non-vessel. *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995).

of Biloxi by two large pilings. The transportation function, if any, of the barge was merely incidental to its primary function as a work platform. As such, it is an "unconventional craft" which is not a vessel in navigation for Jones Act purposes. Since the crane barge to which plaintiff claims assignment is not such a vessel, plaintiff is not a Jones Act seaman. Thus, his claim against the defendants under the Jones Act must fail.

REASONS FOR DENYING CERTIORARI

I.

THE PETITIONER HAS NOT PRESENTED A COMPELLING REASON FOR THIS COURT TO GRANT CERTIORARI.

The first question which Petitioner presents for review is whether the United States Court of Appeals for the Fifth Circuit definition of a Jones Act vessel is too restrictive. The Jones Act, 46 U.S.C. §688 does not specifically provide a definition of the term "vessel". However, this Court has repeatedly held that in order for a claimant to be entitled to seek remedies under the Jones Act as a seaman, two essential requirements must be met. First, the employee's duties must contribute to the function of a **vessel** or to accomplishment of its mission and second, the employee must have a connection to a **vessel** in **navigation** or to an identifiable group of such vessels that is both substantial in its terms of both duration and nature. *Harbor Tug & Barge Co. v. Papai*, ___ U.S. ___, 117 S. Ct. 1535, 137 L.Ed.2d 800 (1997). (**Emphasis added**). Therefore, the United States Court of Appeals for the

Fifth Circuit, as well as several other United States Courts of Appeals have developed and relied upon well established principles for determining whether a purported structure is a "vessel" under the Jones Act.

In *Robert W. Parsons*, 191 U.S. 17, 30, 24 S. Ct. 8, 12, 48 L. Ed. 73 (1903) the Court discussed what types of features are significant in determining whether a structure is a "vessel." The Court stated that "neither size, form, equipment nor means of propulsion are determinative factors upon the question of jurisdiction, **which regards only the purpose for which the craft was constructed, and the business in which it is engaged**." **(Emphasis added)**. *Robert W. Parsons*, 191 U.S. 17, 30, 24 S. Ct. 8, 12, 48 L. Ed. 73 (1903). In *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999 (5th Cir. 1973) the Fifth Circuit Court of Appeals adopted this as a threshold jurisdictional test for the purpose of determining whether or not a person is entitled to assert a claim under the Jones Act. As this Court has repeatedly held, Jones Act coverage is confined to "seamen," those workers who face regular exposure to the perils of the sea. *Papai, supra* at 1542-43; *see Chandris, Inc. v. Latsis*, 515 U.S. 347, 368-72, 115 S. Ct. 2172, 2185, 2190, 132 L.Ed.2d 314 (1995) (reiterating that under Jones Act and maritime law, "seamen" does not include land-based workers and further holding that "Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to 'the special hazards and disadvantages to which they who go down to sea in ships are subjected' ") (citation omitted). Accordingly, since the Jones Act is only intended to provide broad remedies to

cover a distinct class of individuals,[2] the court of appeals and the district courts of the United States have looked to the threshold jurisdictional question of whether a "vessel" exists when a person alleges his/her status as a Jones Act seaman. *Tonneson v. Yonkers Contracting Co.*, 82 F.3d 30, 33 (2nd Cir. 1996) (holding that prerequisite to seaman status and, thus, to recovery under Jones Act is existence of "vessel in navigation").

The courts of appeal and the federal district courts of the United States have commonly submitted this objective inquiry to a jury when there is question as to whether the alleged "vessel" is used for purpose of transporting passengers, cargo or equipment from one place to another across navigable waters. *Tonneson*, 82 F.3d at 36 (holding that summary judgment was inappropriate where there was testimony that the barge in question " 'help[ed] to bring construction supplies to the area' "); *Brunet v. Boh Brothers Construction Co.*, 715 F.2d 196, 198 (5th Cir. 1983) (holding that transportation function of barge in question was more than incidental where the barge had been moved four times over a six-month period and was designed by necessity to transport a pile-driving crane to various job sites). However, where there has been no showing that the alleged "vessel" served a transportation function which was more than incidental to its primary purpose, the courts have found that summary judgment is appropriate. *Hatch v. Durocher Dock & Dredge, Inc.*, 33 F.3d 545, 547-48 (6th Cir. 1994) (holding that primary purpose of flatdeck barge was construction rather than

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[2] *Hatch v. Durocher Dock & Dredge, Inc.*, 33 F.3d 545, 546 (6th Cir. 1994).

transportation or commerce); *DiGiovanni v. Traylor Brothers, Inc.*, 959 F.2d 1119 (1st Cir. 1992) (holding that barge in question was not a Jones Act vessel where the barge had transported nothing for a month and was only moved about piers for working convenience and at night for safety); *Kathriner v. Unisea, Inc.*, 975 F.2d 657 (9th Cir. 1992) (holding that floating fish processing plant was not a "vessel in navigation" and citing *DiGiovanni, supra, Ellender v. Kiva*, 909 F.2d 803 (5th Cir. 1990), *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393 (5th Cir. 1989) and *Bernard v. Binnings Const. Co., Inc.*, 741 F.2d 824, 832 (5th Cir. 1984)); *Ellender v. Kiva*, 909 F.2d 803 (5th Cir. 1990) (holding that the barge in question was not a Jones Act vessel where the barge was built primarily to serve as a work platform, had no independent means of navigation, and was securely anchored at time of accident); *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504 (11th Cir. 1990) (affirming summary judgment where spud barge was constructed for purpose of serving as work platform, was engaged as work platform at time of accident, and its only transportation function was incidental to its primary purpose of serving as a work platform). Of course, "capability to sustain movement is insufficient to establish that a purported 'vessel' is constructed for the purpose of navigation." "[S]ome movement, both perpendicular and lateral, is necessarily part of the regular operation of floating dry docks and similar structures." *Cook v. Belden*, 472 F.2d at 1002. In the case *sub judice* the District Court specifically found, and the Fifth Circuit Court of Appeals affirmed, that "[t]here was nothing before the Court to show that the barge was used in maritime activity" and that the only evidence before the Court showed that the

barge in question was used as nothing more than a work/construction platform. *See District Court's Order* in Appendix C at page 15a of Petition for Writ of Certiorari. Thus, Petitioner has not presented an issue for review that is: in "conflict with a decision of another United States court of appeals on the same matter;" an issue on "an important federal question in a way that conflicts with a decision by a state court of last resort" . . . "or of a United States court of appeals;" "depart[ing] from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court's supervisory power;" an important question of federal law that should be settled by this Court; or an important federal question decided in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10. Consequently, Petitioner has failed to show pursuant to Supreme Court Rule 10 Considerations Governing Review on Certiorari that there is any compelling reason for this Court to grant Petitioner's Writ.

II.

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT PETITIONER'S CLAIM THAT THERE WAS A JURY QUESTION AS TO WHETHER THE BARGE IN QUESTION WAS A "VESSEL". ACCORDINGLY, SUMMARY JUDGMENT WAS APPROPRIATE.

The only issue in this case is whether there was insufficient evidence to support Petitioner's claim that the barge used in the construction of a dockside casino was properly granted summary judgment. Such an evidentiary issue in which the District Court itself found no facts to support the Plaintiff's claim and in which the United States Court of Appeals for the Fifth Circuit

affirmed is not the type of issue in which this Court ordinarily grants a writ of certiorari. *See Lane & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 43 S. Ct. 422 (1923); *Smith v. Butler*, 366 U.S. 161, 81 S. Ct. 937 (1961).

Moreover, reviewing the record evidence as it was required to do, the Court of Appeals correctly concluded that the evidence was insufficient as a matter of law to establish a jury question as to the issue of seaman status since there were no facts to support a finding that the barge in question was in fact a "vessel". In reviewing this issue, the Court of Appeals did not purport to make its own de novo findings of fact nor did it usurp the fact finding function of the District Court. Instead, the Court of Appeals relied on undisputed facts of the District Court's findings and affirmed the Order of the District Court granting the Defendants' Motion for Summary Judgment without opinion.

Petitioner misstates the holding of this Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S. Ct. 1043, 130 L.Ed.2d 1024 (1995) by stating that this Court determined that the crane carrying barge was in fact a vessel. On the contrary, in *Grubart* this Court stated that "[p]etitioners do not here seriously dispute the conclusion of each court below, that the Great Lakes barge is, for admiralty tort purposes, a 'vessel.' " *Compare* Petitioner's Petition for Writ of Certiorari at page 6 with 115 S. Ct. at 1049. Furthermore, in *Grubart* this Court was considering whether admiralty tort jurisdiction existed in a case where the owner of the vessel was attempting to seek shelter under the limitation of liability act for tort claims alleged against the owner of the vessel. Finally, in *Grubart* this Court specifically noted that the barge was at times used for transportation. *Id.* at 1049.

However, in the case *sub judice* there is absolutely no evidence to support that the barge in question was used for transporting cargo, equipment or passengers. Instead, the District Court specifically found that the barge in question was used for construction purposes. *District Court Order in Appendix C at pages 7a, 8a, 13a and 15a* of Petition for Writ of Certiorari.[3]

Although Petitioner claims that "his employers have testified that he was assigned to the barge" and that "all have testified that his duties contributed to the function of this vessel or to the accomplishment of its mission", there is no such testimony by Petitioner's employers in

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[3] Recently, in *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344 (5th Cir. 1998), the Fifth Circuit Court of Appeals discussed the applicable law regarding whether a structure is a "vessel" under the Jones Act. Discussing its previous holding in *Ellender v. Kiva Constr. & Eng'g., Inc.*, 909 F.2d 803 (5th Cir. 1990), the Court stated in Footnote 7 the two factors which lead it to conclude that the transportation function of the structure was incidental to its use as a work platform. The Court stated as follows:

> First, the job constructing the platform was a single assignment for this flotilla. The flotilla did not travel from location to location as Rig 3 was assigned to do. Second, we infer from the facts stated in the opinion that the job was relatively close to shore and an insignificant amount of the flotilla's time was devoted to movement of the equipment and materials to the job site. The flotilla was engaged almost exclusively in performing construction work.

Id. at 350. Likewise, in the case *sub judice*, the District Court concluded that the barge in question was primarily used for construction purposes and that any transportation functions it served were incidental to its primary purpose of constructing the casino.

the record. In fact, Frank Jenkins of RAC testified in the company's Rule 30(b)(6) deposition that Petitioner worked wherever he was needed. *Compare* Petitioner's Petition for Writ of Certiorari at page 8 with *Appendix "A" herein.*

Furthermore, Petitioner claims that the District Court Judge's finding that the work platform was not a vessel is contradicted by the testimony of Mr. John E. Graham, who is *purported* to have stated that "this is a barge that is used to carry cargo and used in navigation over navigable waters." *See* Petitioner's Petition for Certiorari, at page 8. However, Mr. John E. Graham did not testify that the barge **in question** was used to carry cargo and used in navigation over navigable waters. Instead, Mr. Graham testified that "a barge of this **type** could be used to carry cargo. It could be used as a work platform. It could be used as a crane barge. It could be used as a buffer barge. Virtually any – any type of use that someone needs a floating steel box for, that barge would serve the purpose." (**Emphasis added**). *See Appendix "B"* herein.

There is absolutely nothing in the record to support Plaintiff's claim that the barge in question was used for any purpose other than as a work platform. Consequently, Petitioner failed to meet his burden to demonstrate that a jury issue existed as to whether or not he was a Jones Act seaman since there was no evidence to support a finding by the District Court that the barge in question served any other purpose other than the construction of a casino on Biloxi, Mississippi's Back Bay. Accordingly, although the question of seaman status is normally a question for the jury, Petitioner failed to "make a showing sufficient to establish the existence of an element essential to . . . [his] case, and on which

[he] . . . will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986). Therefore, summary judgment was appropriately granted. Consequently, given the fact that there is insufficient evidence to support Plaintiff's claim, this is not the type of issue on which this Court would ordinarily grant a writ of certiorari.

III.

THIS COURT SHOULD NOT EXPEND VALUABLE JUDICIAL RESOURCES ON A CASE IN WHICH THE SAME RESULT IS MANDATED ON SIMILAR ISSUES.

Since the District Court's granting of summary judgment, and prior to the Fifth Circuit Court of Appeal's affirmation of the District Court's Order, this Court in *Harbor Tug & Barge Co. v. Papai*, ___ U.S. ___, 117 S. Ct. 1535, 1540, 137 L.Ed.2d 800 (1997) held that in order for a person to maintain a claim under the Jones Act as a seaman, the plaintiff "must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is **substantial in terms of both its duration and its nature." (Emphasis added)**. Therefore, regardless of whether or not the barge in question is a "vessel" for Jones Act purposes, there is insufficient evidence for the Petitioner to show that he is a Jones Act seaman. At the time of Plaintiff's alleged injury, the Plaintiff was assisting the crane in reaching some materials. Other than being moved from time to time by means of a tug boat to other areas immediately within the construction site, the crane barge was at all other times stationary. The crane barge was securely held in place by two large pilings, "big pins" which went down in to the dirt. Accordingly,

there is absolutely no evidence to suggest that the Petitioner is the in the class of persons whom this Court has found to be entitled to remedies under the Jones Act. The Jones Act was intended to protect sea-based maritime workers who owed their allegiance to a vessel, and not land-based employees, who do not. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 369-72, 115 S. Ct. 2172, 2194 (1995). Furthermore, rights to recovery under the Jones Act for seamen depends on the nature of his service and his relationship to operation of a vessel "plying in navigable waters". *Chandris*, 115 S. Ct. at 2185-2186. Although this Court has recognized that Jones Act remedies may be available to maritime workers who are employed by shipyards, those persons must be workers who "spend the rest of their time at sea." *Chandris*, 115 S. Ct. at 2187-2188. The purpose of the Jones Act remedy "is reserved for sea based maritime employees whose work regularly exposes them to 'the special hazards and disadvantages to which those who go down to sea in ships are subjected.' " *Chandris*, 115 S. Ct. at 2190. As noted by Petitioner in his Petition for Certiorari, the accident alleged by Plaintiff occurred on a barge which was used in the construction of a casino on the back bay of Biloxi, Mississippi. Accordingly, Petitioner is not in the class of workers who are subjected to the perils and the hardships of the sea for which the Jones Act was intended. Thus, Petitioner does not have a connection to the barge in question that is substantial in either its duration or nature. Petitioner is a land-based worker with other remedies appropriately available to him under the law.

CONCLUSION

For the foregoing reasons stated herein, this Court should deny the Petition for Writ of Certiorari that has been presented to the Court. This case does not present an issue which is a compelling reason for this Court to grant Certiorari and does not present a question for review that is in conflict with the decision of another United States court of appeal on this matter. Furthermore, Petitioner failed to meet his burden to come forth with sufficient evidence to overcome the District Court's granting of summary judgment and the Fifth Circuit's affirmation thereof. Accordingly, this Court need not further review such findings where Petitioner failed to meet his burden. Moreover, a wholly and independent basis exists pursuant to this Court's holding in *Papai* and *Chandris* to find that Petitioner is not a seaman. Consequently, Petitioner does not meet the requisite threshold to assert a claim under the Jones Act and therefore, there is no compelling reason for this Court to grant the writ.

Respectfully submitted,

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APPENDIX A

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

PAUL CLARK	PLAINTIFF
VERSUS	CIVIL ACTION NO. 1:94CV585RR
ROY ANDERSON CORPORATION, JOHN DOE and R. A. BUILDING CORPORATION	DEFENDANTS

30(B) (6) DEPOSITION OF FRANK JENKINS

Taken on behalf of the Plaintiff, Friday, June 7, 1996, commencing at 9:42 a.m., at the offices of Bryant, Clark, Dukes, Blakeslee, Ramsay & Hammond, located at 2223 – 14th Street, in the City of Gulfport, County of Harrison, State of Mississippi, before Judi S. Morrow, CSR No. 1254 and Notary Public, within and for the County of Harrison, State of Mississippi.

APPEARANCES:

WOODROW W. PRINGLE, III, ESQUIRE
2301 – 14TH Street,
Suite 720 (39501)
Post Office Box 925
Gulfport, Mississippi 39502-0925

Appearing on behalf of the Plaintiff.

JAMES O. DUKES, ESQUIRE
Bryant, Clark, Dukes, Blakeslee, Ramsey
& Hammond
2223 – 14th Street (39501)
Post Office Box 10
Gulfport, Mississippi 39502-0010

Appearing on behalf of the Defendant,
Roy Anderson Corporation.

[p. 2] APPEARANCES CONTINUED:

JOSEPH B. GUILBEAU, ESQUIRE
3838 North Causeway Boulevard,
Suite 2500
Metairie, Louisiana 70002

Appearing on behalf of the Defendant,
R. A. Building Corporation.

ALSO PRESENT:

Brandi Sinopoli, Court Reporting Intern

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* * *

[p. 8] A. Yes, I did.

Q. Do you know what Paul Clark's job was at the Boomtown Casino project?

A. I think he was classified on his paperwork as an ironworker, but we were using him as a rigger.

Q. Can you try to give me a job description of what a rigger would be?

A. When you're moving material with a crane, he rigs it, hooks it up to the crane; and whenever it's landed wherever it might be going, then he unhooks it. That's basically his duties.

Q. All right. And was Mr. Clark assigned to work on a particular barge or with a particular crane at Boomtown?

A. He was a rigger. Now, when you say a particular barge or a particular crane, he was more or less wherever the crane went, I mean, if you needed him on another crane and not to say that he was just stuck with this crane. I just want to clarify that. He was wherever you needed him.

* * *

APPENDIX B

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[p. 1] UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

PAUL CLARK NO.: 1:95CV585RR

VERSUS

ROY ANDERSON CORPORATION,

JOHN DOE AND R. A. BUILDING

CORP.

The deposition of MR. JOHN E. GRAHAM, taken in the above-entitled cause before Holly Bergeron, a Certified Shorthand Reporter, authorized to administer oaths of witnesses, pursuant to Section 961.1 of Title 13 of the Louisiana Revised Statutes of 1950, as amended, pursuant to the following stipulation, taken in the offices of McDonough Marine Service, 2300 Surekote Road, New Orleans, Louisiana, on the 28th of August, 1996.

[p. 2] APPEARANCES:

WOODROW W. PRINGLE, III
ATTORNEY AT LAW
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Gulfport, Mississippi, 39502
FOR THE PLAINTIFF

BRYANT, CLARK, DUKES, BLAKESLEE,
RAMSAY & HAMMOND
(BY: Mr. James O. Dukes and Mr. Mike Orr, Esq.)
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FOR THE DEFENDANT

JOSEPH B. GUILBEAU
Attorney at Law
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Suite 2500
Metairie, Louisiana, 70002
FOR THE DEFENDANT

REPORTED BY:

HOLLY BERGERON, CCR
Registered Professional Reporter

* * *

[p. 13] Q: Is that the type of barge that your company does lease?

A. Yes.

Q. All right. Again, the type of barges as in Exhibit 1, what type of leases do you do for that type of barge – the uses that that barge would be used for?

A. Well, a barge of this type could be used to carry cargo. It could be used as a work platform. It could be used as a crane barge. It could be used as a buffer barge. Virtually any – any type of use that someone needs a floating steel box for, that barge would serve the purpose.

* * *